

1 THE HONORABLE RONALD B. LEIGHTON

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6 U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

7 JACOB BEATY and JESSICA BEATY, on
8 behalf of themselves and all others similarly
9 situated,

10 Plaintiffs,

11 vs.

12 FORD MOTOR COMPANY,

13 Defendant.
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NO. 3:17-cv-05201 RBL

**PLAINTIFFS' RESPONSE TO
DEFENDANT FORD MOTOR
COMPANY'S MOTION TO DISMISS**

JURY TRIAL DEMAND

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Defendant Ford Motor Company has refused to acknowledge a dangerous defect in the panoramic sunroof unit that is installed in many of its vehicles. The defective nature of the sunroof causes it to shatter—suddenly, violently, and without warning—raining shards of glass on the vehicle’s occupants. Drivers across the country continue to experience terrifying instances of their sunroofs shattering, and many of those drivers have complained to Ford as well as to the National Highway Traffic Safety Administration (NHTSA). The Korean Automobile Testing & Research Institute (KATRI) concluded that materials used in Ford’s panoramic sunroofs makes them less durable than ordinary glass, all but confirming that the sunroofs are defective. While other automobile manufacturers with similar safety problems voluntarily initiated safety recalls to protect consumers from the shattering panoramic sunroofs, Ford conceals the sunroof defect from current and potential owners and lessors of its vehicles.

Plaintiffs Jacob and Jessica Beaty experienced the defect firsthand. When Ms. Beaty was driving the couple’s Ford Escape on I-5 South with her baby daughter in the backseat, the panoramic sunroof suddenly shattered with a sound like a gunshot, raining glass into the vehicle and cutting both Ms. Beaty and her daughter. Plaintiffs filed this lawsuit on behalf of all others who have purchased or leased a Ford vehicle with a factory-installed panoramic sunroof. They allege that Ford’s conduct violates the Washington Consumer Protection Act, breaches Ford’s express and implied warranties, and constitutes fraudulent concealment. Plaintiffs seek damages and equitable relief, including an injunction ordering Ford to repair the defect.

Ford has moved to dismiss all of Plaintiffs’ claims but none of its arguments provides a basis for dismissal. Because Plaintiffs allege that all Ford sunroofs are substantially similar in design and manufacture, they may pursue claims on behalf of the owners and lessors of all Ford vehicles with the defective factory-installed panoramic sunroofs. Ford argues on the one hand that Plaintiffs have not sufficiently alleged its knowledge of the common defect despite hundreds of complaints of shattered sunroofs, recalls by other manufacturers, and governmental investigations in the U.S., Europe and Korea, while on the other hand arguing that *Plaintiffs*

1 should have known of the defect by March 2013. Plaintiffs have sufficiently alleged Ford's
2 knowledge based on information about other manufacturers' similarly defective sunroofs and
3 other data that Ford tracks as part of its business. Plaintiffs' claims for fraudulent concealment
4 and violation of the CPA are not time barred because they would not have known from news
5 about other auto manufacturers' sunroofs that their own sunroof was defective, and they had no
6 reason to even look for that information until their sunroof shattered in February 2017. Ford's
7 challenges to Plaintiffs' express warranty claim also lack merit, as Plaintiffs have alleged that
8 Ford's limited warranty is unconscionable and fails of its essential purpose. Plaintiffs therefore
9 request that the Court deny Ford's motion.

10 II. STATEMENT OF FACTS

11 A. Plaintiffs and at least dozens of other Ford drivers have experienced spontaneously 12 shattering sunroofs.

13 Plaintiffs Jacob and Jessica Beaty purchased a new 2013 Ford Escape on September 25,
14 2012, after conducting extensive research into the safety, reliability, and price of the vehicle.
15 ¶¶ 69-70.¹ The Beatys consulted with the salespeople at Scarff Ford in Auburn, Washington,
16 before purchasing the car. ¶ 70. The Beatys purchased the Titanium model of the Escape with
17 Ford's "Power Panoramic Vista Roof." ¶ 69. Ford advertised its panoramic sunroof feature as a
18 technological advancement. ¶ 72. It was a huge selling point for the Beatys. ¶ 71.

19 The panoramic sunroof on the Beatys' Escape shattered on February 8, 2017, when Ms.
20 Beaty was driving with her young daughter on I-5 South. ¶ 72. Ms. Beaty heard an explosion
21 that sounded like a shotgun being fired. *Id.* Being careful of the nearby on and off ramp traffic,
22 Ms. Beatty looked up and could see that the sunroof was missing a lot of glass. *Id.* The
23 proximity of the on and off ramps made it difficult to exit and Ms. Beaty feared being hit, so
24 she continued driving and closed the sunroof cover. *Id.* When it was safe to get out of the
25 vehicle, Ms. Beaty parked and checked on her daughter, who had a scratch on her forehead

26 ¹ "¶ __" refers to paragraphs in Plaintiffs' Class Action Complaint and "Ex. __" refers to
27 exhibits to the Complaint (ECF No. 1).

1 from the falling glass. ¶ 73. Ms. Beaty had multiple scratches on her hands. *Id.* She drove to the
2 closest Ford dealership in Olympia, Washington to get the sunroof repaired but was told that it
3 was out of warranty. ¶ 75.

4 Plaintiffs made a claim for the sunroof repair through their car insurance carrier and
5 paid a \$500 deductible. ¶ 76. They also paid \$110.94 for a rental car to use while the sunroof
6 was being replaced with an identical panoramic sunroof. ¶¶ 76-77. Plaintiffs now fear opening
7 the sunroof shade because the sunroof might shatter again. *Id.*

8 Dozens of other Ford drivers have reported shattered sunroofs to NHTSA. ¶¶ 34, 44 &
9 Ex. 1. It is likely that more drivers have shared this terrifying experience since all of Ford's
10 panoramic sunroofs are substantially similar in design and manufacture. ¶¶ 23-33.

11 **B. Ford's panoramic sunroofs have a common defect that causes them to shatter.**

12 Panoramic sunroofs are made of tempered or laminated glass attached to tracks set
13 within a frame attached to the vehicle. ¶ 23. Panoramic sunroofs present manufacturing, design,
14 and safety challenges for manufacturers because the large plates of glass take up much of the
15 surface area of the vehicle's roof. ¶ 24. Ford uses tempered glass for the sunroofs, which
16 creates an outer layer of compression shrink-wrapped around the middle of the glass that is
17 constantly pressing outwards, creating tension or tensile force. ¶¶ 25-26. Tempered glass is
18 designed to be stronger than non-tempered glass, but if the compressive layer is compromised
19 the entire piece of glass fails catastrophically, and often explosively. *Id.* Ford also uses thinner
20 glass to improve fuel efficiency, which increases the probability of catastrophic failure. ¶ 27.

21 Ford applies large areas of ceramic paint to its sunroofs before tempering. ¶ 25. Ceramic
22 paints are known "adulterants" and significantly weaken the structural strength and integrity of
23 the tempered glazing. ¶ 29. Among other factors, ceramic enamels compromise glass strength
24 because: (1) the enamels have different thermal expansion coefficients than the glass substrates
25 (the glass and the paint expand at different rates), resulting in residual stress between the
26 ceramic enamel and the glass substrate; and (2) the glass frit will ion exchange with the glass
27 substrate lessening or eliminating the compressive layer above the tensile region thereby

1 significantly weakening it. *Id.* The large ceramic paint areas on Ford's panoramic sunroofs
2 result in the glass becoming progressively weaker and more likely to spontaneously break. ¶ 30.

3 In 2013, KATRI concluded after testing that the enamel used for ceramic paint areas in
4 tempered panoramic sunroofs impairs the strength of the glass, making the glass less durable
5 than the usual toughened glass and ordinary glass. ¶ 31. At the end of June 2016, an Informal
6 Working Group on Panoramic Sunroof Glazing was established by the United Nations
7 Economic Commission for Europe Group confirmed that conventional automotive glass
8 enamels weaken the mechanical strength of panoramic sunroof glazing. ¶¶ 31-32.

9 Ford affixes the sunroofs in a manner that reduces road and wind noise and risk of
10 leakage, but the flexing and vibration caused by ordinary driving adds additional stress to the
11 already-compromised sunroofs. ¶ 33. In Ford's vehicles, the compromised tempered glass
12 cannot withstand the pressures and flexing that the sunroof frame and vehicle demand, even
13 when the vehicle is brand new or is parked and sitting still. *Id.*

14 **C. Ford has known about the problem with its panoramic sunroofs but conceals it.**

15 Ford is well aware that its panoramic sunroofs spontaneously shatter due to a common
16 defect through direct complaints and complaints filed with NHTSA. ¶¶ 6, 7, 34, 35, Ex. 1. Ford
17 knows of the problem and that it is widespread from monitoring NHTSA complaints and using
18 other data tracking methods to monitor vehicle performance. ¶¶ 36, 43, 44, 45. And Ford knows
19 NHTSA is investigating the issue of shattering panoramic sunroofs because it has issued
20 multiple requests for information to Ford. ¶¶ 40-47.

21 Other manufacturers that sell vehicles with similar panoramic sunroofs have voluntarily
22 initiated safety recalls to notify drivers of the danger and repair the sunroofs. ¶¶ 55-59, 64. Ford
23 has chosen to conceal the danger and blames the shattering on impact from objects on the
24 roadway—despite contrary evidence. ¶¶ 52, 60-63. Ford also replaces shattered panoramic
25 sunroofs with identically defective sunroofs that are prone to shattering again. ¶¶ 63, 77.

1 **D. Plaintiffs' claims**

2 Plaintiffs assert claims for violation of the Washington Consumer Protection Act,
3 breach of express warranty, and fraudulent concealment on behalf of a proposed class of all
4 persons and entities residing in the United States, including its territories, who purchased or
5 leased a Class Vehicle, defined as all models of Ford, Lincoln and Mercury vehicles that are
6 equipped with substantially similar factory-installed panoramic sunroofs.² In the alternative,
7 Plaintiffs assert their claims on behalf of a class of all persons and entities residing in
8 Washington who purchased or leased a Class Vehicle in Washington.

9 **III. ARGUMENT**

10 When deciding a Rule 12(b)(6) motion, a court must accept the plaintiff's allegations as
11 true and construe them in the light most favorable to the plaintiff. *Cousins v. Lockyer*, 568 F.3d
12 1063, 1067 (9th Cir. 2009). A motion to dismiss should be denied if the Court finds the plaintiff
13 pled "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v.*
14 *Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads
15 factual content that allows the court to draw the reasonable inference that the defendant is liable
16 for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plausibility
17 standard is not a "probably requirement," since it asks only whether the complaint "'raises[s] a
18 reasonable expectation that discovery will reveal evidence' to support the allegations." *Starr v.*
19 *Baca*, 652 F.3d 1202, 1217 (9th Cir. 2011) (quoting *Twombly*, 550 U.S. at 556).

20 **A. Plaintiffs may assert claims relating to all affected vehicles.**

21 Ford argues that Plaintiffs may pursue claims only on behalf of consumers who bought
22 or leased the same Ford models they did. Plaintiffs disagree. The issue is not whether the
23

24 ² Ford argues in a footnote that nationwide certification is inappropriate because the Court will
25 have to apply the law of all 50 states but, perhaps recognizing that the majority of courts defer
26 this issue until class certification, focuses solely on Washington law in its motion to dismiss.
27 *See, e.g., Clancy v. Bromley Tea Co.*, 308 F.R.D. 564, 572-73 (N.D. Cal. 2013) ("[A] detailed
choice-of-law analysis is not appropriate at this stage of the litigation. Rather, such a fact-heavy
inquiry should occur during the class certification stage, after discovery.")

1 *vehicle models* are the same, it is which models have substantially similar *panoramic sunroofs*.
2 Regardless, the issue is premature. As the Ninth Circuit recently held, “[r]epresentative parties
3 who have a direct and substantial interest have standing; the question whether they may be
4 allowed to present claims on behalf of others who have similar, but not identical, interests
5 depends not on standing, but on an assessment of typicality and adequacy of representation.”
6 *Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015) (citation omitted). Courts in this
7 Circuit determine whether plaintiffs may pursue claims on behalf of class members who
8 purchased different products as part of the class certification analysis because the issue is
9 “better taken under the lens of typicality or adequacy of representation, rather than standing.”
10 *Coe v. Philips Oral Healthcare Inc.*, No. C13-518-MJP, 2014 WL 722501, at *4 (W.D. Wash.
11 Feb. 24, 2014); *see also Clancy*, 308 F.R.D. at 569-71 (recognizing that the question of whether
12 a plaintiff may represent purchasers of other products “is not a standing inquiry, but rather an
13 early analysis of the typicality, adequacy, and commonality requirements of Rule 23”).

14 If the Court considers the issue at this stage, it should deny Ford’s motion to dismiss.
15 Plaintiffs have alleged that the panoramic sunroofs in all Ford, Lincoln, and Mercury vehicles
16 are substantially similar in design and manufacture. “[T]he majority of federal courts that have
17 addressed the issue hold a plaintiff may have standing to assert claims for unnamed class
18 members based on products he or she did not purchase” when the products “are substantially
19 similar.” *Coe*, 2014 WL 722501, at *4 (plaintiffs had standing to bring claims on behalf of
20 class members who bought different products where the plaintiffs alleged that all products had
21 the same defect); *see also Carideo v. Dell, Inc.*, 706 F. Supp. 2d 1122, 1134 (W.D. Wash.
22 2010) (plaintiffs could bring claims on behalf of purchasers of computer models they did not
23 buy where they “pleaded the same core factual allegations and causes of action”); *Jones v.*
24 *Porsche Cars N. Am., Inc.*, No. CV 15-5766-GW(SSX), 2015 WL 11995257, at *2 (C.D. Cal.
25 Oct. 15, 2015) (plaintiffs had standing to pursue claims on behalf of class members who
26 purchased different models where they alleged all vehicles had similarly defective
27 windshields); *Philips v. Ford Motor Co.*, No. 14-CV-02989-LHK, 2015 WL 4111448, at *6-7

1 (N.D. Cal. July 7, 2015) (plaintiffs had standing to pursue claims based on vehicles they did not
2 purchase where they alleged that the steering system in all vehicles was substantially similar).

3 The Honorable Ricardo S. Martinez recently considered this issue in a case involving
4 shattering panoramic sunroofs in Nissan vehicles where the plaintiffs allege that the panoramic
5 sunroofs in seven different models of Nissan vehicles across nine different model years
6 spontaneously shatter, including five models that they had not purchased or leased. *Lohr v.*
7 *Nissan N. Am., Inc.*, No. C16-1023RSM, 2017 WL 1037555, at *2 (W.D. Wash. Mar. 17,
8 2017). The court held that the plaintiffs “have standing to pursue claims related to vehicles they
9 did not lease or purchase” because “Plaintiffs’ assertion of a common defect and complaints
10 from drivers of vehicle models Plaintiffs seek to represent ... allege a ‘sufficient similarity’
11 between Plaintiffs’ vehicles and the vehicle models they seek to represent.” *Id.* at *4. Similarly,
12 in *Glenn v. Hyundai Motor America*, the plaintiffs alleged that the panoramic sunroofs in
13 several models of Hyundai vehicles spontaneously shatter, including two models they had not
14 purchased or leased. No. SACV 15-2052-DOC, 2016 WL 3621280, at *1-2 (C.D. Cal. June 24,
15 2016). The court held the plaintiffs could assert claims on behalf of class members who bought
16 different models because they alleged that “all the models’ sunroofs were made with tempered
17 glass, thinned to improve fuel efficiency, and coated with ceramic paint” and included
18 complaints to NHTSA about shattered sunroofs in the two models the plaintiffs had not
19 purchased. *Id.* at *16.

20 As in *Glenn* and *Lohr*, Plaintiffs allege that the panoramic sunroofs in all models of
21 Ford vehicles are substantially similar and suffer from a common defect: they are made of
22 tempered glass that features large areas of ceramic paint; if the compressive layer of tempered
23 glass is compromised, the entire piece of glass fails catastrophically; the panoramic sunroofs
24 are made of thinner glass in order to improve fuel efficiency; thinner glass is difficult to temper
25 properly and increases the probability of catastrophic failure; the ceramic paint applied to the
26 sunroofs prior to tempering weakens the structure of the sunroof; and the fastening of the
27 sunroof to the vehicles with the sufficient degree of tightness weakens the sunroof. ¶¶ 23-33.

1 Plaintiffs allege these common characteristics of the panoramic sunroofs make them prone to
2 suddenly shatter.

3 Plaintiffs have also included 99 complaints made to NHTSA by drivers of Ford, Lincoln
4 and Mercury vehicles who have experienced shattered panoramic sunroofs, including drivers of
5 most of the models of Ford vehicles included in the proposed class. Ex. 1. These complaints,
6 combined with allegations that three other auto companies have recalled cars with similar
7 panoramic sunroofs, that NHTSA, KATRI, and UN Economic Commission are investigating
8 shattering panoramic sunroofs, confirm that the problem is not limited to Plaintiffs' vehicle.
9 ¶¶ 31-32, 39-47, 48, 55-59. *Lohr* is not distinguishable; the fact that Nissan includes panoramic
10 sunroofs in fewer models than Ford and its subsidiaries does not mean that the panoramic
11 sunroofs in the Ford vehicles are any less similar than those in Nissan vehicles. And in *Lohr*, as
12 Ford acknowledges, Plaintiffs did not include complaints from every model included in the
13 proposed class. *Lohr*, 2017 WL 1037555, at *4.

14 Ford contends that factors like the shapes, sizes and suppliers of the glass may affect the
15 propensity of its panoramic sunroofs to shatter and argues that differences between cars, pick-
16 ups and SUVs may play a role. For purposes of this motion, however, the Court must accept
17 Plaintiffs' allegations as true. *Cousins*, 568 F.3d at 1067. Plaintiffs allege that all of the
18 panoramic sunroofs share a substantially similar design and manufacturing process. ¶ 20. Ford
19 characterizes Plaintiffs' allegations as "conclusory" because they do not refer specifically to
20 each Ford brand and model, but Plaintiffs have provided a detailed description of the design
21 and manufacture of panoramic sunroofs and the alleged defect, which is common to the
22 panoramic sunroofs of several other auto manufacturers and not unique to Ford and its
23 subsidiaries. ¶¶ 26-33. The consistency of the NHTSA complaints, and the NHTSA, KATRI
24 and UN investigations into panoramic sunroofs made by Ford, Nissan and other manufacturers
25 confirm that the defect spans the differences that Ford tries to highlight. ¶¶ 31-32. Ford cites no
26 cases to support its argument that these types of variations must be considered on a motion to
27 dismiss. Cases like *Lohr*, *Glenn* and *Coe* confirm that Plaintiffs' allegations are sufficient.

1 **B. Plaintiffs sufficiently allege Ford’s knowledge of the defective sunroofs.**

2 Plaintiffs allege that Ford knows about the defective panoramic sunroofs from multiple
3 sources. First, numerous drivers complained to both Ford and NHTSA about shattering
4 panoramic sunroofs as early as 2008. ¶¶ 6, 7, 34, 35, Ex. 1. Plaintiffs allege that Ford, like other
5 auto manufacturers, monitors NHTSA complaints. ¶ 36. Ford also receives and documents
6 reports from customers and dealerships, receives warranty claims, and receives reports from
7 vehicle service and technical support activities and field operations. ¶ 43. Ford knows NHTSA
8 is investigating the issue of shattering panoramic sunroofs because NHTSA has issued multiple
9 requests for information to Ford. ¶¶ 40-47. Plaintiffs also allege that Ford is aware that other
10 manufacturers that sell vehicles with similar panoramic sunroofs —Volkswagen, Hyundai, and
11 Audi—voluntarily initiated safety recalls to notify drivers of the danger and repair the sunroofs.
12 ¶¶ 48, 55-59, 64. KATRI and the United Nations Economic Commission for Europe are also
13 conducting investigations into shattering panoramic sunroofs, and Ford is certainly aware of
14 those investigations as well. ¶¶ 31-32, 58-59.

15 These allegations are sufficient to establish Ford’s knowledge of the defect. *See, e.g.,*
16 *Avedisian v. Mercedes-Benz USA LLC*, CV 12–00936 DMG (CWx), 2013 WL 2285237, at *1,
17 7 (C.D. Cal. May 22, 2013) (copies of dated customer complaints sufficiently established
18 defendant’s knowledge of the defect at the time of the plaintiff’s purchase); *Falk v. Gen.*
19 *Motors Corp.*, 496 F. Supp. 2d 1088, 1096 (N.D. Cal. 2007) (finding the plaintiffs sufficiently
20 alleged GM’s knowledge of an alleged defect because “[o]nly GM had access to the aggregate
21 data from its dealers,” pre-release testing data, and “numerous complaints from its customers”);
22 *Cirulli v. Hyundai Motor Co.*, No. SACV 08-0854 AG, 2009 WL 5788762, at *4 (C.D. Cal.
23 June 12, 2009) (allegations that Hyundai tracked the NHTSA database and thus knew its
24 vehicles were experiencing unusually high levels of structural deterioration were sufficient to
25 plead Hyundai’s knowledge).

26 Ford argues that the 99 NHTSA complaints are insufficient in light of the number of
27 vehicles it has sold, but how many reports of spontaneously shattering panoramic sunroofs are

1 necessary—in combination with complaints Ford received directly and industry knowledge of
2 the problem—for Ford to recognize that it has a dangerous problem? Ford’s knowledge does
3 not turn solely on the number of complaints made to NHTSA and it does not require a specific
4 percentage of purchasers and lessors to have made public complaints. A review of the NHTSA
5 complaints excerpted in Exhibit 1 to Plaintiffs’ complaint confirms the uniformity of the
6 problem: Ford’s panoramic sunroofs spontaneously shatter without impact from outside
7 objects. The minor variations that Ford latches onto—whether a car was parked or driving at a
8 particular speed, whether the shattered sunroof had a hole in the middle or broke along the
9 edge, whether the glass appeared to blow upward or downward into the vehicle—are consistent
10 with the uniform defect Plaintiffs allege. *See, e.g.*, ¶ 33 (“In the Ford models at issue, the
11 compromised tempered glass cannot withstand the pressures and flexing that the sunroof frame
12 and vehicle demand, even when the vehicle is brand new or is parked and sitting still.”).

13 Ford also suggests it could not have known that *its* panoramic sunroofs were defective
14 just because NHTSA was investigating the spontaneous shattering of *Kia*’s panoramic
15 sunroofs, but Plaintiffs allege that the design and manufacture of the sunroofs is substantially
16 similar throughout the auto industry (¶¶ 3-4, 24-33)—something Ford notes in its brief—and
17 NHTSA expanded its investigation to include Ford’s panoramic sunroofs. ¶¶ 40-47. Plaintiffs
18 do not yet know when Ford received the 150 complaints it reported to NHTSA, or the details of
19 those complaints. ¶ 44. It is, however, remarkable that Ford acknowledges having received 150
20 complaints about shattered panoramic sunroofs in only three models sold during a limited time
21 period. Even assuming some overlap with the 99 NHTSA complaints, the number of proposed
22 class members who have experienced a sudden shattering of the panoramic roof in their Ford
23 vehicles is far too high for Ford to claim ignorance.

24 Ford cites distinguishable cases in which the plaintiffs relied on consumer complaints
25 that were either undated, unlike the 99 NHTSA complaints that Plaintiffs provided with their
26 complaint, or made after the plaintiffs purchased their vehicles. *See Wilson v. Hewlett-Packard*
27 *Co.*, 668 F.3d 1136, 1148 (9th Cir. 2012) (plaintiffs relied solely on consumer complaints,

1 mostly undated and from unknown sources); *Gotthelf v. Toyota Motor Sales, U.S.A., Inc.*, 525
2 F. App'x 94, 104 (3d Cir. 2013) (plaintiff failed to allege when complaints and warranty claims
3 were made); *Williams v. Yamaha Motor Corp., U.S.A.*, 106 F. Supp. 3d 1101, 1114-16 (C.D.
4 Cal. 2015) (plaintiffs included no consumer complaints before the plaintiffs' purchases and the
5 earliest identified complaint was found on an online forum after the defendant stopped selling
6 the allegedly defective motor and with no evidence it was ever communicated to the
7 defendant); *Utica Nat'l Ins. Group v. BMW of N. Am., LLC*, 45 F. Supp. 3d 157, 162 (D. Mass.
8 2014) (no evidence that BMW received the nineteen complaints before the plaintiff's loss, and
9 BMW issued a recall to correct the defect); *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 927
10 (N.D. Cal. 2012) (plaintiff alleged that Apple started investigating the alleged defect in
11 response to complaints about the iPhone 4, which was not released until after the plaintiff's
12 purchase of an earlier model). By contrast, Plaintiffs have provided the Court with 20
13 complaints made to the NHTSA before Plaintiffs purchased their vehicle, and 97 complaints
14 before Plaintiffs' sunroof spontaneously shattered. Ex. 1.

15 The other cases Ford cites are also distinguishable. In several, the plaintiffs alleged only
16 that the auto manufacturer knew about the defect from "internal sources" like unspecified
17 complaints received and dealership records. *See Herremans v. BMW of N. Am., LLC*, No. CV
18 14-02363 MMM (PJWx), 2014 WL 5017843, at *16-17 (C.D. Cal. Oct. 3, 2014) (plaintiff's
19 allegations on information and belief that BMW knew of leaking water pump in Mini Coopers
20 from "internal sources" like unspecified consumer complaints, pre-release testing, and
21 dealership repair records, were conclusory and did not show that BMW knew of the defect
22 before plaintiff's purchase); *Grodzitsky v. Am. Honda Motor Co.*, No. 2:12-CV-1142-SVW-
23 PLA, 2013 WL 690822, at *6-7 (C.D. Cal. Feb. 19, 2013) (same, plus ten online complaints,
24 four of which were made after the plaintiffs bought their vehicles). In other cases it was not
25 clear that the cited complaints even referenced the alleged defect. *See Marcus v. Apple Inc.*, No.
26 C 14-03824 WHA, 2015 WL 151489, at *6 (N.D. Cal. Jan. 8, 2015) (plaintiffs cited 365
27 "reviews" of laptop failures posted to the Apple website but did not say which of the reviews

1 referenced a failure due to the allegedly defective logic board as opposed to some other type of
2 laptop failure); *McQueen v. BMW of N. Am., LLC*, No. 12-06674 (SRC), 2014 WL 656619, at
3 *4-5 (D.N.J. Feb. 20, 2014) (allegations of fewer than ten consumer complaints that may not
4 have addressed the alleged defect were insufficient to show BMW's knowledge). And in
5 *Berenblat v. Apple, Inc.*, the court found the plaintiffs' allegations of consumer complaints
6 posted on the Apple website were "persuasive" but dismissed their claim under the
7 "fraudulent" prong of California's Unfair Competition Law because the plaintiffs did not
8 establish that "reasonable consumers 'had an expectation or assumption about' the functionality
9 of the [allegedly defective] memory slots" in their computers. Nos. 08-4969 JF (PVT), 09-1649
10 JF (PVT), 2010 WL 1460297, at *8-9 (N.D. Cal. Apr. 9, 2010). By contrast, reasonable
11 consumers expect their vehicles to be safe and their panoramic sunroofs to not suddenly shatter.

12 **C. Plaintiffs state a claim for violation of the Consumer Protection Act.**

13 Plaintiffs allege that Ford engaged in unfair and deceptive acts or practices in violation
14 of the CPA by failing to disclose the common defect in its vehicles' panoramic sunroofs, failing
15 to warn consumers about the defect, and replacing shattered panoramic sunroofs with sunroofs
16 that have the same defect. ¶¶ 118-20. Focusing on deceptiveness—and thus conceding that
17 Plaintiffs have sufficiently alleged that Ford engaged in *unfair* acts or practices³—Ford argues
18 that Plaintiffs have not shown that Ford's omissions are likely to mislead a reasonable
19 consumer because no reasonable consumer would expect Ford to disclose that its panoramic
20 sunroofs spontaneously shatter. Ford's contention that Plaintiffs have provided no more than "a
21

22 ³ Courts find conduct to be unfair in violation of the CPA when it "causes or is likely to cause
23 substantial injury to consumers which is not reasonably avoidable by consumers themselves
24 and is not outweighed by countervailing benefits," or when it "offends public policy as
25 established 'by statutes [or] the common law,' or is 'unethical, oppressive, or unscrupulous,'
26 among other things." *Mellon v. Regional Trustee Serv. Corp.*, 182 Wn. App. 476, 489-90, 334
27 P.3d 1120 (2014) (quoting *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 786-87, 295 P.3d 1179
(2013)). No proof of deception or likelihood to mislead is required. *See Panag v. Farmers Ins.
Co. of Wash.*, 166 Wn.2d 27, 51 (2009) ("The universe of 'unfair' business practices is broader
than, and encompasses the universe of 'deceptive' business practices.").

1 bare allegation of a ‘defect,’” nothing more than “glass sunroofs break,” ignores Plaintiffs’
2 detailed allegations of the nature of the defect and its prevalence. ¶¶ 26-52.

3 The hundreds of Ford drivers who have experienced a spontaneously shattered
4 panoramic sunroof, often while driving at high speeds, undoubtedly, and reasonably, expect
5 Ford to disclose that its sunroofs have a tendency to shatter without impact from outside
6 objects. ¶¶ 34, 53, 54, Ex. 1. The investigations launched by NHTSA, KATRI, and United
7 Nations Economic Commission for Europe into the propensity of panoramic sunroofs like
8 Ford’s to spontaneously shatter confirm that the problem is far more serious and pervasive than
9 Ford is willing to acknowledge. The NHTSA and KATRI have reported that a shattering
10 sunroof can injure the vehicle’s occupants and increase the risk of a crash. ¶¶ 57-58. Three
11 other automakers have recalled vehicles with panoramic sunroofs, citing the safety risk posed
12 by suddenly shattering sunroofs. ¶¶ 55-56.

13 Plaintiffs’ allegations go far beyond the mere characterization of Plaintiffs’ shattered
14 sunroof as a defect. Plaintiffs describe the aspects of the design and manufacture of the
15 sunroofs that results in spontaneous shattering, including the use of tempered glass with large
16 areas of ceramic paint (¶ 25), a tempering process that may compromise the compressed outer
17 layer of glass (¶ 26), the use of thinner glass to save weight and improve vehicle fuel efficiency
18 (¶ 27), the use of ceramic paint that impairs the strength of the glass (¶¶ 28-32), and the method
19 of fastening the sunroof to the vehicle (¶ 33). Plaintiffs allege that these characteristics of
20 Ford’s panoramic sunroofs cause them to be unable to withstand the flexing and vibration
21 caused by ordinary driving, ultimately causing the glass to shatter. ¶ 33.

22 Plaintiffs’ detailed allegations of the defect, complaints by more than 90 Ford drivers
23 who have experienced spontaneously shattered sunroofs, investigations into the problem by
24 governmental agencies around the world, and the safety recalls of three other auto
25 manufacturers sufficiently support their contention that consumers would find the sunroof
26 defect to be material and would expect Ford to disclose it. Ford’s refusal to even acknowledge
27 the problem, much less disclose it to new purchasers and lessors as well as current owner and

1 lessors of its vehicles falls squarely within the broad definition of unfair and deceptive acts or
2 practices that violate the CPA. *See Panag v. Farmers Ins. Co. of Washington*, 166 Wn. 2d 27,
3 49, 204 P.3d 885 (2009) (“By broadly prohibiting ‘unfair or deceptive acts or practices in the
4 conduct of any trade or commerce,’ RCW 19.86.020, the legislature intended to provide
5 sufficient flexibility to reach unfair or deceptive conduct that inventively evades regulation.”);
6 *see also* RCW 19.86.920 (“[T]his act shall be liberally construed that its beneficial purposes
7 may be served.”).

8 Several other courts have denied motions to dismiss consumer protection claims based
9 on similar allegations. *See Lohr*, 2017 WL 1037555, at *4 (plaintiffs’ allegations that Nissan
10 knows its panoramic sunroofs have a propensity to shatter that Nissan failed to disclose the
11 defect, and that Nissan systematically denies coverage for the repair “indicate Nissan’s acts and
12 practices are capable of deceiving the public”); *Glenn*, 2016 WL 3621280, at *11 (finding the
13 plaintiffs stated a claim for violation of California consumer protection laws where they alleged
14 that Hyundai knows about the danger of its panoramic sunroofs shattering and does not warn
15 consumers about the risk); Order Granting in Part and Denying in Part Defendants’ Motion to
16 Dismiss and Motion to Strike at 23-24, *Kondash v. Kia Motors Am., Inc.*, No. 1:15-cv-00506-
17 SJD (S.D. Ohio June 24, 2016), ECF No. 49 (finding plaintiff stated a claim under the Ohio
18 consumer protection statute where he alleged that Kia knew or should have known its
19 panoramic sunroof was prone to shatter but failed to disclose it).

20 Plaintiffs’ allegations of the problem with Ford’s panoramic sunroofs are far more
21 detailed and concrete than in the cases Ford cites, where courts dismissed consumer protection
22 claims under other states’ laws because the plaintiffs’ sparse allegations did not establish that
23 there was anything wrong with the product. *See Iannacchino v. Ford Motor Co.*, 888 N.E.2d
24 879, 882, 887-88 (Mass. 2008) (finding the plaintiffs did not allege the outside door handle
25 systems in their vehicles failed to comply with the applicable federal safety standard and
26 therefore could not allege an injury under the Massachusetts consumer protection statute);
27 *Munch v. Sears Roebuck & Co.*, No. 06-cv-7023, 2007 WL 2461660, at *2-3 (N.D. Ill. Aug.

27, 2007) (dismissing consumer protection claims where the plaintiffs' contention that Sears concealed a defect in its washing machines was "based solely on the allegations that their particular machines required a single repair" and thus failed to satisfy Rule 9(b)'s heightened pleading standard); *see also Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 794-95 (N.J. 2005) (plaintiffs suffered no ascertainable loss as a result of alleged defect that did not show when the gas tank was full because Mercedes repaired it and provided loaner vehicles).

D. Plaintiffs' fraudulent concealment and CPA claims are not time barred.

Ford contends (incorrectly) that Plaintiffs have not alleged that *Ford* knows its panoramic sunroofs are defective, yet in the next breath argues that a more limited universe of the same information was sufficient to put *Plaintiffs* on notice of their fraudulent concealment and CPA claims by March 1, 2013. But the type of information that confirms Ford's knowledge of the defect would not have put Plaintiffs on notice even if they had known to search for it. As a seller of vehicles with panoramic sunroofs, Ford is familiar with the materials, design and manufacture of its and its competitors' sunroofs. Ford is therefore aware that government investigations into shattering panoramic sunroofs of other auto manufacturers are relevant to the safety of its vehicles' sunroofs because they share common materials and design; Ford knows that safety recalls of panoramic sunroofs by other manufacturers implicate its own vehicles because of the similarities; Ford tracks NHTSA complaints, news articles, and other information about component parts of the vehicles it sells and the vehicles sold by competitors; and Ford receives complaints and reports from dealers directly about its vehicles. Vehicles and their component parts are Ford's business and monitoring information about its own vehicles and developments in the industry is critical to maintaining its competitive edge.

Plaintiffs, on the other hand, are retail consumers who do not spend their days steeped in news about the auto industry and each component part of their vehicle. The information Ford contends should have put Plaintiffs on notice of their claims relates primarily to panoramic sunroofs in vehicles sold by other auto manufacturers, including the NHTSA investigations, blog posts and news articles (which discuss shattering sunroofs in Hyundai, Nissan, Kia and

1 Audi vehicles, not Ford), and the Hyundai and Volkswagen recalls. The only Ford-specific
2 information Ford cites is 25 complaints on NHTSA's website—a database that requires
3 searchers to use a keyword describing what they are looking for. In other words, Plaintiffs
4 would have to know to search for complaints about the panoramic sunroof in their vehicle to
5 find them. Because Ford has remained silent about the problem—and in fact continues to deny
6 that there is anything wrong with their sunroofs—there was no reason for Plaintiffs to search
7 for complaints about Ford panoramic sunroofs until theirs exploded in February 2017. *See*
8 *Philips*, 2015 WL 4111448, at *8 (plaintiffs “had no reason to suspect wrongdoing, and there
9 was no fact or circumstance to prompt an investigation” until the defect manifested).

10 This information that Ford claims was available to Plaintiffs in March 2013 is therefore
11 nothing like the information that was available to the plaintiff in *Bergeron v. Select Comfort*
12 *Corp.*, which included a website created by the defendant disclosing mold problems with its
13 mattresses, a news article in a national publication available on the internet⁴ discussing the
14 mold problem in the defendant's mattresses (which also noted that consumers can unzip the
15 mattress to look for mold), and a Consumer Products Safety Commission file that addressed the
16 mold problem in the defendant's mattresses. No. A-15-cv-00657-LY-ML, 2016 WL 155088, at
17 *6 (W.D. Tex. Jan. 11, 2016), *adopted by* 2016 WL 4401313 (W.D. Tex. Feb. 24, 2016). The
18 plaintiff also alleged that she knew there was a problem with her mattress—she claimed she
19 and her family were sick for many years despite several moves, with the only constant being
20 their mattress—so she (unlike Plaintiffs in this case) had reason to seek out information about
21 problems with the mattress. *Id.* at *2. Plaintiffs' sunroof, by contrast, exploded suddenly and
22 with no warning, giving them no reason to investigate until the damage had been done.

23 Ford's other cases are equally distinguishable, both because they address unrelated
24 factual scenarios and because they were decided on summary judgment, not a motion to
25 dismiss. *See Allen v. State*, 118 Wn.2d 753, 759, 826 P.2d 200 (1992) (affirming summary
26

27 ⁴ The Wall Street Journal article about panoramic sunroofs is only available to subscribers.

1 judgment for defendant where the plaintiff could have learned about the conviction of her
2 husband's murderers from widespread press coverage); *Shepard v. Holmes*, 185 Wn. App. 730,
3 741-42, 345 P.3d 786 (2014) (affirming summary judgment for defendant where a recorded
4 deed constituted constructive notice to the plaintiff of the consolidation of her lots when she
5 purchased the property); *Hudson v. Condon*, 101 Wn. App. 866, 875, 6 P.3d 615 (2000)
6 (affirming summary judgment for defendant where the plaintiff was told of changes to a lease
7 and confirmed his damages in a written response, triggering the statute of limitations).

8 **E. Plaintiffs state a claim for breach of express warranty.**

9 Plaintiffs allege that Ford breaches its express warranty by selling and leasing vehicles
10 with defective panoramic sunroofs, by requiring repair or replacement within the short
11 warranty period, and by not correcting the defect. ¶¶ 94-95. Ford argues that Plaintiffs' breach
12 of warranty claim should be dismissed because their sunroof shattered after the three-year
13 warranty on their vehicle expired. This argument ignores that Plaintiffs allege the warranty
14 period is unconscionable because Ford knew or should have known the panoramic sunroofs
15 were defective at the time of sale or lease and a gross disparity in bargaining power exists
16 between Plaintiffs and Ford. ¶ 99. As a result, Plaintiffs had no meaningful choice in
17 determining the time limitations, which unreasonably favor Ford. These allegations are
18 sufficient to state a claim for breach of warranty. *See, e.g., Lohr*, 2017 WL 1037555, at *6
19 (finding plaintiffs stated a breach of express warranty claim by alleging that Nissan knew or
20 should have known about the defective panoramic sunroof at the time of sale and that it would
21 fail before the end of the useful life of the vehicle, that plaintiffs had no meaningful choice in
22 determining the time limitations that favored Nissan, and that there was a gross disparity in
23 bargaining power); *Szymczak v. Nissan N. Am., Inc.*, No. 10 cv 7493 (VB), 2011 WL 7095432,
24 at *10 (S.D.N.Y. Dec. 16, 2011) (denying dismissal of plaintiffs' claim that the durational
25 limitation in Nissan's express warranty was unconscionable where the plaintiffs alleged that
26 Nissan sold vehicles despite awareness of a radiator defect and plaintiffs had no meaningful
27 choice about the time limits due to a disparity in bargaining power); *Bussian v.*

1 *DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 621-23 (M.D.N.C. 2006) (finding allegations that
2 GM knew of and failed to disclose product defect and purchasers lacked a meaningful choice
3 with respect to the terms of the warranty due to unequal bargaining power stated a claim for
4 breach of warranty based on durational limitation in warranty).⁵

5 Ford contends that its warranty is not unconscionable because it is not unfair and does
6 not “shock the conscience.” But Ford’s knowing sale of vehicles with defective panoramic
7 sunroofs that explode after the warranty period has expired, often while the vehicles are being
8 driven on highways at 50 miles per hour, and frequently, *does* shock the conscience and renders
9 the limited, nonnegotiable terms of the warranty unconscionable. Ford’s suggestion that
10 Plaintiffs could have spent more to purchase an extended warranty does not make it any less
11 unconscionable that Ford sells a vehicle with a warranty that is likely to expire before the
12 panoramic sunroof defect manifests. Even if Plaintiffs had paid extra for an extended warranty,
13 it is unclear whether it would have covered the shattered panoramic sunroof since Ford offers
14 different “ESP plans ... in various time, distance and deductible combinations” that cover
15 different components. Motion, Ex. A at 33.

16 Ford cites *Smith v. Ford Motor Co.*, where the court found the plaintiff failed to offer
17 evidence of unconscionability in response to Ford’s summary judgment motion. 749 F. Supp.
18 2d 980, 993-94 (N.D. Cal. 2010). *Smith* does not control the outcome in this case; the Court
19 must accept Plaintiffs’ allegations as true for purposes of Ford’s motion to dismiss, and allow
20 Plaintiffs the opportunity to present evidence of unconscionability at the appropriate juncture.
21 See RCW 62A.2-302 (“ When it is claimed or appears to the court that the contract or any
22 clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to
23

24 ⁵ There is no suggestion that the plaintiffs argued the warranties were unconscionable in the
25 cases addressing express warranties under California law that Ford cites. See *In re Sony PS3 &*
26 *Other OS Litig.*, 551 F. App’x 916, 919 (9th Cir. 2014) (affirming the dismissal of plaintiffs’
27 claim that Sony breached its one-year express warranty); *Clemens v. DaimlerChrysler Corp.*,
534 F.3d 1017, 1023 (9th Cir. 2008) (dismissing warranty claim where repairs to an allegedly
defective head gasket were made after the warranty expired).

1 present evidence as to its commercial setting, purpose and effect to aid the court in making the
2 determination.”); *Nelson v. McGoldrick*, 127 Wn.2d 124, 133-34, 896 P.2d 1258 (1995)
3 (holding that evidence is necessary to determine whether a contract is unconscionable although
4 the issue may in some circumstances be decided on summary judgment); *see also Carlson v.*
5 *Gen. Motors Corp.*, 883 F.2d 287, 292-93 (4th Cir. 1989) (holding that the district court erred
6 in ruling that durational limitations on GM’s implied warranties were “reasonable” and
7 “conscionable” on a motion to dismiss because the plaintiffs should have had the opportunity to
8 present evidence).

9 Ford argues that *Lohr*, 2017 WL 1037555, at *6, is distinguishable because the court
10 did not consider the availability of an extended warranty option or analyze the factors
11 considered by Washington courts. It would have been inappropriate for the *Lohr* court to rule
12 on the plaintiffs’ unconscionability argument on a motion to dismiss—just as it would be
13 inappropriate for this Court to do so—since plaintiffs must be allowed to present evidence.

14 Ford’s warranty also fails of its essential purpose because Ford replaces defective
15 panoramic sunroofs with identical defective sunroofs. ¶¶ 63, 77. Courts recognize “the well-
16 established principle that a warranty which is expressly limited to repair or replacement fails of
17 its essential purpose when the manufacturer is unable to successfully repair the defect at issue
18 within a reasonable time.” *In re Caterpillar, Inc. C13 & C15 Engine Prods. Liab. Litig.*, No.
19 1:14-cv-3722 (JBS-JS), 2015 WL 4591236, at *25 (D.N.J. July 29, 2015) (denying motion to
20 dismiss the plaintiffs’ express warranty claims where the defendant was unable to repair a
21 defect in plaintiffs’ vehicle engines); *see also Philippine Nat’l Oil Co. v. Garrett Corp.*, 724
22 F.2d 803, 808 (9th Cir. 1984) (recognizing that a repair or replace limited warranty fails of its
23 essential purpose if repair attempts are unsuccessful within a reasonable time); *Strickler v.*
24 *Peterbilt Motors Co.*, No. Civ. A. 04-3628, 2005 WL 1266674, at *2-3 (E.D. Pa. May 27,
25 2005) (denying summary judgment of the plaintiff’s express warranty claim where a tractor
26 engine’s defects were still present after the defendants attempted repairs because “the remedy
27 of repair or replacement is the ‘silver bullet’ that the buyer receives ‘[i]n exchange for parting

1 with an arsenal of legal remedies” and “[i]f the limited remedy fails, the ‘silver bullet turns to
2 dust,’ leaving the buyer defenseless and at the seller’s mercy”).

3 Because Ford replaces shattered sunroofs with sunroofs that suffer from the same
4 defect, Ford’s warranty fails of its essential purpose. *See, e.g., Lohr*, 2017 WL 1037555, at *6
5 (finding the plaintiffs stated a breach of warranty claim where they alleged that Nissan replaced
6 shattered panoramic sunroofs with equally defective sunroofs); *Horvath v. LG Elec.*
7 *Mobilecomm U.S.A., Inc.*, No. 3:11-cv-01576-H-RBB, 2012 WL 2861160, at *6 (S.D. Cal. Feb.
8 13, 2012) (denying dismissal where the plaintiffs alleged the defendant replaced their defective
9 phones with phones that had the same defects); *Porcell v. Lincoln Wood Prods., Inc.*, No. Civ-
10 08-0617 MAC/LFG, 2010 WL 1541264, at *3 (D.N.M. Mar. 31, 2010) (denying motion to
11 dismiss plaintiffs’ breach of warranty claim where the plaintiffs alleged the defendant merely
12 replaced a defective window with a window suffering from the same defect that caused the first
13 one to fail prematurely). Ford argues that *Lohr* is distinguishable because the court only
14 decided the issue as to the plaintiff whose sunroof shattered during the warranty period, but
15 Plaintiffs sought to enforce the warranty and were turned away by a Ford authorized dealer
16 because the warranty expired before their sunroof shattered. ¶ 75. Moreover, the replacement
17 sunroof installed in Plaintiffs’ vehicle by Auto Glass Professionals is the same as the factory-
18 installed sunroof that shattered because all of the panoramic sunroofs manufactured for Ford’s
19 vehicles are similarly defective. ¶¶ 63, 77. Under Washington law, a defendant’s warranty fails
20 of its essential purpose when it “never lived up to the specifications of the contract.” *Milgard*
21 *Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 707-08 (9th Cir. 1990).

22 Finally, Ford contends that Plaintiffs’ express warranty claim must be dismissed
23 because Plaintiffs do not allege that they notified Ford of the breach of warranty. First, the
24 statute Ford cites requires notice to the seller—in this case Scarff Ford, the Ford dealer that
25 sold the vehicle to Plaintiffs—and not to Ford, the manufacturer. RCW 62A.2-607(3)(a) (“The
26 buyer must within a reasonable time after he or she discovers or should have discovered any
27 breach notify the *seller* of breach” (emphasis added)); *see also La Hue v. Coca-Cola Bottling*,

1 *Inc.*, 50 Wn.2d 645, 647, 314 P.2d 421 (1957) (holding that the notice requirement in former
2 version of RCW 62A.2-607(3) does not apply when the action is not against the seller); *Cats v.*
3 *Monaco RV, LLC*, No. C 14-1484-JCC, 2016 WL 5253204, at *4 (W.D. Wash. Sept. 22, 2016)
4 (holding that plaintiffs did not have to provide the manufacturer defendant with notice of their
5 RV's defective engine when they bought the RV from a dealer). If Ford contends it is the seller
6 and must receive notice even though its dealer Scarff Ford sold the vehicle to Plaintiffs, then by
7 the same logic Plaintiffs' notice of the shattered sunroof to Mullenix Ford would satisfy the
8 notice requirement. Each dealership has the ability to repair and service Ford warranty claims.
9 *See* Motion, Ex. 1 at 1 ("When you need warranty repairs, your selling dealer would like you to
10 return to it for that service, but you may also take your vehicle to another Ford Motor Company
11 dealership authorized for warranty repairs.").

12 Second, Plaintiffs filed their complaint on March 16, 2017, giving Ford notice of the
13 breach a mere 36 days after their sunroof shattered on February 8, 2017. *See Round Gold LLC*
14 *v. Ameron Int'l Corp.*, No. C07-791Z, 2008 WL 3288408, at *5 (W.D. Wash. Aug. 7, 2008)
15 (denying summary judgment for the defendant where the plaintiff, "a retail consumer rather
16 than a merchant buyer," provided timely notice in December 2005 after discovering the breach
17 in May 2004); *see also Kasey v. Suburban Gas Heat of Kennewick, Inc.*, 60 Wn.2d 468, 474,
18 374 P.2d 549 (1962) (holding that whether service of the complaint more than four months
19 after the discovery of breach constituted timely notice was a question of fact for the jury).
20 Finally, Plaintiffs allege they were not required to provide notice "because affording Ford a
21 reasonable opportunity to cure its breach of written warranty would have been futile. Ford
22 knew of the defect and chose to conceal it and to fail to comply with its warranty obligations.
23 Further, the replacement sunroof used by Ford is also defective." ¶ 96.

24 **F. Plaintiffs state a claim for breach of implied warranty.**

25 Ford argues that Plaintiffs' implied warranty claim should be dismissed because they
26 have not alleged privity with Ford. But Plaintiffs allege that they are third-party beneficiaries of
27 contracts between Ford and its dealers, with whom Plaintiffs had direct dealings, and that

1 Plaintiffs were intended to be the ultimate consumers of the vehicles. ¶ 129(a) & (b). Courts
2 recognize these allegations create factual issues as to whether plaintiffs are intended
3 beneficiaries who can assert implied warranty claims absent privity. *See, e.g., Horvath*, 2012
4 WL 2861160, at *7; *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices*
5 *& Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1184-85 (C.D. Cal. 2010) (citing cases); *see also*
6 *Tex. Enter., Inc. v. Brockway Standard, Inc.*, 149 Wn.2d 204, 213-14, 66 P.3d 625 (2003)
7 (discussing third party beneficiary exception to privity requirement for implied warranty
8 claims).

9 Ford cites *Baughn v. Honda Motor Co., Ltd.*, which did not address the third-party
10 beneficiary exception to privity. 107 Wn.2d 127, 151-52, 727 P.2d 655 (1986). The
11 Washington Supreme Court recognized that “[t]he privity requirement is relaxed, however,
12 when a manufacturer makes express representations, in advertising or otherwise, to a plaintiff.”
13 *Id.* at 151. Plaintiffs allege that they researched the safety of their vehicle prior to purchase and
14 that Ford’s advertising holds out the panoramic sunroofs as advanced technology. ¶¶ 21-22, 70.
15 Ford acknowledges that its customers have implied warranties if they purchase their vehicles
16 for non-commercial use. Motion, Ex. A at 7 (“you may have an implied warranty of
17 merchantability (that the car or light truck is reasonably fit for the general purpose for which it
18 was sold”). Ford authorizes owners and lessees to have repairs made by any of its authorized
19 dealers. *Id.*, Ex. A at 1, 9.

20 The statute of limitations on Plaintiffs’ implied warranty claim was also tolled due to
21 Ford’s fraudulent concealment of the defect. *See Giraud v. Quincy Farm & Chem.*, 102 Wn.
22 App. 443, 455, 6 P.3d 104 (2000) (the doctrine of fraudulent concealment applies to warranty
23 claims). Unlike *Giraud*, where the plaintiffs were sufficiently concerned about damage to their
24 plants from the herbicide they purchased from the defendant that they met with both the
25 defendant and manufacturer, *id.* at 445, 456, Plaintiffs had no reason to suspect anything was
26 wrong with their sunroof until it suddenly exploded. Meanwhile, Ford concealed the defect
27 from Plaintiffs and other owners and lessees of Ford vehicles despite its exclusive knowledge

1 and the safety risk created by the defect. *See Wood v. Gibbons*, 38 Wn. App. 343, 346, 685 P.2d
2 619 (1984) (the fraudulent concealment doctrine “applies when a defendant has concealed facts
3 or otherwise induced a plaintiff not to bring suit”); *see also Carideo*, 706 F. Supp. 2d at 1133 (a
4 duty to disclose arises when “a manufacturer has superior information regarding defects that
5 are not readily ascertainable to customers”); *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 698,
6 994 P.2d 911 (2000) (a duty disclose arises “where one party is relying upon the superior
7 knowledge and experience of the other” or “where a seller has knowledge of a material fact not
8 easily discoverable by the buyer”); *Ehrlich v. BMW of N. Am., LLC*, 801 F. Supp. 2d 908, 917-
9 18 (C.D. Cal. 2010) (car manufacturer had a duty to disclose a windshield defect that created an
10 unreasonable safety risk even after the warranty period expired). Ford has also issued limited
11 safety recalls to replace the panoramic sunroofs on models manufactured during certain time
12 frames⁶ and responded to inquiries from NHTSA about its panoramic sunroofs without
13 disclosing the defect to owners and lessees of its vehicles. *See August v. U.S. Bancorp*, 146 Wn.
14 App. 328, 347, 190 P.3d 86 (2008) (fraudulent concealment tolls the statute of limitations
15 where the defendant “engaged in affirmative conduct that would lead a reasonable person to
16 believe that no claim of fraudulent concealment existed”).

17 IV. CONCLUSION

18 Ford’s panoramic sunroofs shatter suddenly, spontaneously, and without warning,
19 sounding like a gunshot and showering drivers and their passengers with broken glass. Three
20 other automobile manufacturers have recalled and repaired the dangerous panoramic sunroofs
21 in their vehicles. Ford has chosen to stay silent, leaving drivers of its vehicles at risk of
22 accidents and injury from falling glass, and endangering other drivers on the roads. Plaintiffs’
23

24
25 ⁶ *See* ¶ 49; Ford Issues One Safety Recall and One Safety Compliance Recall in North America
26 (Sept. 28, 2016) [https://media.ford.com/content/fordmedia/fna/us/en/news/2016/09/28/ford-](https://media.ford.com/content/fordmedia/fna/us/en/news/2016/09/28/ford-issues-one-safety-recall-and-one-safety-compliance-recall-i.html)
27 [issues-one-safety-recall-and-one-safety-compliance-recall-i.html](https://media.ford.com/content/fordmedia/fna/us/en/news/2016/09/28/ford-issues-one-safety-recall-and-one-safety-compliance-recall-i.html). “Courts routinely take
judicial notice of such things as ... corporate press releases.” *City of Roseville E’ees’ Ret. Sys.*
v. Sterling Fin. Corp., 963 F. Supp. 2d 1092, 1107 (E.D. Wash. 2013) (citing cases).

1 allegations establish their standing to pursue the claims they assert and the viability of their
2 claims against Ford. Plaintiffs request that the Court deny Ford's motion to dismiss.

3 RESPECTFULLY SUBMITTED AND DATED this 30th day of June, 2017.

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